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IN THE

SUPREME COURT

Filed Sept. 22, 1900.

IN THE

UNITED STATES.

OCTOBER TERM, 1899.

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,
v.
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 313.

THE OREGON RAILWAY & NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,
v.
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 314.

Brief for the Oregon Railroad & Navigation Company.

W. W. COTTON,
for Appellants.

A. B. BROWNE,
Of Counsel.

PORTLAND, OREGON:
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Brief for the Oregon Railroad & Navigation Company.

In October, 1892, the barge Columbia and the steamer Ocklahama were owned by the Oregon Railway & Navigation Company, but were leased to the Oregon Short Line & Utah Northern Railway Company for a period of ninety-nine years, and the Oregon Short Line & Utah Northern Railway Company was exclusively operating said barge and steamer. On the 19th

of October, 1892, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat to be transported upon said barge from Portland, Oregon, to Astoria, Oregon. The barge was under the charge of a captain who had no connection with any boat or vessel other than the Columbia, and the captain of said barge, for and on behalf of said company, executed and delivered to Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded. Afterwards, but on the same day, the Columbia was taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a point or place in the City of Portland, known as the "boneyard," and there remained from the 19th of October, 1892, until the afternoon of the 21st of October. During the afternoon of the 21st of October, the Ocklahama took the Columbia in tow for the purpose of towing the Columbia from the boneyard in Portland to the dock at Astoria of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company. Marshal B. Short was captain of the Ocklahama, and John August Peterson was a deckhand on the Ocklahama. While making a landing at the dock at Astoria, the Columbia struck a floating pontoon, which was kept next the wharf as a fender, and the Columbia sprung a leak. The persons in charge of the Columbia deemed it advisable to remove the barge into more shallow water, and the barge was therefore taken behind the dock, where she rested on the bottom of the Columbia river and was listed against the dock in a safe position. Afterwards, the master of the barge, one Ferguson, caused a portion of the cargo to be shifted until the barge was on an even keel and was no

longer resting against the dock. At the time the cargo was shifted the tide was ebbing and after the barge came to an even keel she rested in that position for a short time, when, the tide having ebbed and the barge having no lateral support, she keeled over away from the dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away her deckhouse, and a large part of the cargo slid into the river, and the hull of the barge was broken down by the shock. Marshal B. Short and John August Peterson, who were in the hull of the barge, were killed. After the accident, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, as lessee, filed in the District Court of the United States for the District of Oregon their petition praying for a limitation of the personal liability of the petitioners arising out of the damage done by the destruction of the Columbia. (Record, p. 1.)

No attempt was made to limit their liability as owners of the Ocklahama, and no offer to surrender the Ocklahama was made.

In that petition it was alleged:

That the Oregon Railway & Navigation Company was a corporation organized under the laws of the State of Oregon; and, as such corporation, was the owner of a certain barge or lighter operated upon the Columbia and Willamette rivers, known as the Columbia; that the Oregon Short Line & Utah Northern Railway Company was a corporation duly organized and existing under and by virtue of an act of congress of the United States entitled "An act creating the Oregon Short Line Railway Company, a corpration, in the Territories of

Utah, Idaho and Wyoming, and for other purposes," approved August 2, 1882; and, as such corporation, was engaged in the business of owning and operating steamboats and other vessels, barges and lighters between Portland, in the State of Oregon, and Astoria, in said state, and was, during all the times mentioned in the said petition, the lessee from the Oregon Railway & Navigation Company for a period of ninety-nine years from the 1st day of January, 1887, of the barge Columbia, and was, during all the times mentioned in said petition, operating said barge Columbia, and had the sole and exclusive possession, charge, control and management of the said barge; that, on the 21st day of October, 1892, the said barge Columbia left Portland, having on board a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon, said wheat being part of the cargo of the British ship Westgate, and destined to be transported by means of said ship and lighter from Portland, Oregon, to Liverpool, England. That all went well with said barge until said barge, on the night of the 21st day of October, reached Astoria, at which point the said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company; that lying in front of said dock and floating nearly level with the water, was a pontoon; that the darkness of the night rendered it impossible for the pilot in charge of the Ocklahama, a steamboat towing said barge, to see the said pontoon, and, in attempting to make a landing at said dock, the barge ran against said pontoon with sufficient force to break the stem of the said barge and to start her timbers to such an extent that the barge commenced leaking; that said barge was thereupon taken behind said dock and placed alongside the rear

portion thereof, and, after an examination had been made, it was found that the barge would, probably, float if the pumps were used, and thereupon the men in charge of the barge commenced using the pumps, and kept the leak under control; that the cargo upon said barge was entirely loaded upon her deck, as it was customary in vessels of her character, and, at the time the pumps were working, no part of the cargo of the said barge was injured in any manner whatsoever; that the man in charge of said barge undertook to stop the leak by building a bulkhead; that, in order to aid in the work of the building of said bulkhead, three men, among others, entered the hold of the barge; that these men were Marshal Short, the captain of the Ocklahama; William Boyce and Gus Peterson, both deckhands on the Ocklahama; that the tide, at this time, was ebbing, and, while the men were in the hold of the barge, the same touched ground; that an examination was thereupon made by the men in charge of the said barge as to her condition and position, and such men thereupon concluded to continue with the work of undertaking to stop the said leak, believing that the barge would sink into the mud and remain upright; that, as the tide continued to fall, the barge suddenly listed to one side away from the said dock, and partially turned over; that said Marshal Short and Gus Peterson were caught by the falling cargo of the said barge, consisting of wheat in sacks, and were killed; that a large amount of the cargo of the barge was thrown into the water, and the barge subjected to such a severe strain that her house was carried away and her hull damaged; that William Boyce claimed to have been injured by being thrown down as the result of the listing of the said barge; that said

accident happened, and the loss and damage above set forth were occasioned, without the fault, privity or knowledge of the petitioners, or either of them, and were due solely to the perils of the sea.

The said petition then alleged that the administratrix of Gus Peterson, and the firm of Balfour, Guthrie & Co., owners of the cargo, were threatening to commence actions against the petitioners to recover damages claimed to have been suffered by said accident; and that William Boyce had commenced an action against the petitioners in the Circuit Court of the State of Oregon for Multnomah County, to recover damages alleged to have been suffered by him, and that said action was then pending; that the claims so made by said Peterson were largely in excess of the value of the barge; that the petitioners, and each of them, desire to contest their liability for damages caused by the said accident, and, also, to claim the benefit of the limitation of liability provided in the third and fourth sections of the act of congress, entitled "An act to limit the liability of shipowners, and for other purposes," approved March 3, 1851, now embodied in sections 4283 and 4285 of the Revised Statutes of the United States, and of the various statutes in addition thereto and amendatory thereof, and particularly the act of congres approved June 19, 1886, and to that end prayed that an appraisement might be had of the value of the barge Columbia, and of her freight, then pending.

The petition then proceeds to state the facts by which exemption from liability is claimed in addition to the facts thereinbefore alleged. On behalf of the Oregon Railway & Navigation Company, it was alleged that the barge Columbia had been leased by it for a period

of ninety-nine years to the Oregon Short Line & Utah Northern Railway Company, and that, under said lease, the Oregon Short Line & Utah Northern Railway Company had entered into the use and enjoyment of said barge, and that the barge, at the time of the accident, was in the sole and exclusive management and control of the Oregon Short Line & Utah Northern Railway Company, and that none of the men on board of the said barge were officers or agents of the Oregon Railway & Navigation Company; that the wheat destroyed, belonging to Balfour, Guthrie & Co., was being carried by the Oregon Short Line & Utah Northern Railway Company under and by virtue of a bill of lading issued by that company, and was not being carried, handled or controlled in any manner whatsoever by the Oregon Railway & Navigation Company.

On behalf of the Oregon Short Line & Utah Northern Railway Company, it was alleged that the Columbia was staunch and seaworthy, and properly manned and equipped for the voyage in which she was engaged, and was under the charge and management of proper and suitable officers. That the captain of the barge Columbia executed and delivered to Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, and that said receipt contained a provision exempting the Oregon Short Line & Utah Northern Railway Company from all injuries not caused by the actual negligence of the said company or its agents; that the agreement contained in said receipt was signed by said Balfour, Guthrie & Co., owners of the said wheat, and that said wheat was carried under the terms and provisions of said shipping receipt,

and not otherwise; that the injury to said wheat did not occur by reason of any negligence on the part of either of the petitioners or any of their agents or servants, but was caused solely by a peril over which the petitioners had no control.

It was alleged in the petition that Short, Boyce and Peterson well knew of the danger of working in the hold of the said barge, and that each of said persons was guilty of negligence contributing to his injury.

The petition then prayed that an appraisement might be had of the Columbia, that a monition should issue against all persons claiming damages for any loss, damage or injury occasioned by the said accident, citing them to appear before the court and make proof of their claims, and that, in the meantime, and until the final judgment of the court, an order be made restraining the further prosecution of any and all suits against the petitioners.

Upon the filing of the petition, the District Court appointed appraisers to ascertain the value of the Columbia (Transcript of Record, p. 8), and these appraisers determined the value of the barge to be $100.00 (Transcript of Record, p. 9). On December 6, 1892, the Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company gave a bond for the appraised value of the barge (Transcript of Record, p. 10), and, on the 12th day of December, 1892, the District Court made an order reciting the proceedings already had, and the desire of the petitioners to limit their liability and, at the same time, to contest the same and that of the barge Columbia, and ordered that "the prosecution of all suits and proceedings against the Oregon Short Line

& Utah Northern Railway Company or the Oregon Railway & Navigation Company, in respect to any claim for damages for any loss, destruction, damage or injury occasioned on the 21st and 22d days of October, 1892, or her (the barge Columbia's) loss or destruction, be and the same is hereby, restrained." (Record, p. 12.)

Balfour, Guthrie & Co., the owners of the wheat lost (Record, p. 17), Malvina Short, as administratrix of the estate of Marshal B. Short (Record, p. 28), Sven Anderson, as administrator of the estate of John August Peterson (Record, p. 32), Annie C. Larson, mother of John August Peterson (Record, p. 38), and William Boyce (Record, p. 22), appeared in the proceeding and filed answers to the petition and resisted the claim of petitioners to a limitation of liability.

The answer of Balfour, Guthrie & Co. admits the incorporation of the petitioners, as alleged in the petition, and the making of the lease of the Columbia to the Oregon Short Line & Utah Northern Railway Company, and admits that the Oregon Short Line & Utah Northern Railway Company was at the time of the accident operating the Columbia and had the sole and exclusive possession, charge, control and management of the barge, and admits the contract for the carriage of the wheat. The answer then alleges, among other things, that the barge was not sound, staunch or seaworthy at the time she was loaded for the voyage in question; that her cargo was carelessly, negligently and improperly loaded, and that the barge was, in fact, overloaded; that the barge was insufficiently manned and equipped, and her crew were without the necessary skill and experience for the business in which she was

engaged; that all these matters were, at the time, well known to the owners, their officers, agents and employes; that both the tug Ocklahama and the barge were so negligently handled at the time of the landing of the barge at the dock at Astoria, that the bow of the barge was stove in, and that, in removing her to the inside of the dock, the petitioners were guilty of negligence and unskillfulness. The amendment to the answer made by the stipulation (Transcript of Record, p. 82), alleges, among other things, that the Ocklahama had not been surrendered. The answer prays that the appraisement of the Columbia be set aside and "that the respondent be decreed to recover from said libelants and petitioners the full amount of their damage in this behalf sustained," and for such other relief as to the court shall deem meet.

An amendment to this answer was made by stipulation (Record, p. 82), by which amendment it was alleged, among other things, that the Columbia had not been surrendered.

The answers of Malvina Short, administratrix, Sven Anderson, administrator, and Anna C. Larsen are all similar in form, and admit the incorporation of the petitioners as alleged, and admit that the Oregon Short Line & Utah Northern Railway Company was, at the time of the accident, operating the barge Columbia under the lease, and had the sole and exclusive possession, charge, control and management of the said barge; and admit that the Columbia was well manned and properly managed, but deny that the Columbia was seaworthy or properly loaded. After various other admissions and denials, the answers allege the incorporation of the Oregon Short Line & Utah Northern Rail-

way Company, and that said company, at the time of the accident, was in the use and possession of the Columbia; that the Columbia was old, rotten and leaky, and without suitable pumps, and that the said Oregon Short Line & Utah Northern Railway Company had knowledge of such facts; that the said Oregon Short Line & Utah Northern Railway Company, with such knowledge, negligently and carelessly loaded said barge far beyond the capacity of said barge to carry with safety in its then condition, and that, by reason of the unsound and unsafe condition of said barge, the accident to Short and Peterson occurred. The answer of Malvina Short prays that the order and monition be set aside, and that a personal judgment be rendered "against said libelants for $5,000.00." The answer of Sven Anderson prays that the order and monition be set aside, and that personal judgment be entered "against the said libelants (the Oregon Short Line & Utah Northern Railway Company) for $5,000.00"; and the answer of Anna C. Larsen prays that the order and monition be set aside, and that personal judgment be given "against the said libelants (the Oregon Short Line & Utah Northern Railway Company) for the sum of $6,000.00."

In and by neither of said answers of the respondents was any relief sought *in rem* against the steamer Ocklahama; but in and by each of said answers, as hereinbefore alleged, judgments *in personam* were prayed against the Oregon Short Line & Utah Northern Railway Company or against the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company.

The allegations of the answer of William Boyce are

not material, for the reason that no final decree was made in his favor (see decree of December 20, 1897, Record, p. 516); he having, prior to final decree, accepted the amount allwed him by decree of February 26, 1894 (Record, p. 84).

Testimony was taken before Bellinger, district judge (Record, pp. 103-387), and, after argument, that judge handed down a written opinion (Record, p. 86), in which the conclusion was reached that the petitioners were entitled to limit their liability to the value of the Columbia. As the result of this opinion, a decree to that effect was entered February 19, 1894 (Record, p. 84). By this decree the petitioners were ordered to pay into court $100.00, and the clerk of the court was ordered to distribute this amount, and to pay one-third thereof to Balfour, Guthrie & Co., one-third thereof to William Boyce, and one-third thereof to Malvina Short, Sven Anderson and Anna C. Larsen.

From this decree Malvina Short, as administratrix, Sven Anderson, as administrator, and Balfour, Guthrie & Co. appealed (Record, p. 91), and their appeal was allowed (Record, p. 100). The appeal was taken by Balfour, Guthrie & Co. in their firm name, without specifying the names of the persons constituting the partnership. No citation issued upon this appeal, but a notice signed by the proctors for the persons appealing, and directed to the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and their proctor was served. No service of any citation or notice was made upon William Boyce or Anna C. Larsen, and no appeal was taken by either Boyce or Larsen.

Said cause on said appeal to the Circuit Court of

Appeals was entitled "Malvina Short, administratrix, etc., Sven Anderson, administrator, etc., and Balfour, Guthrie & Co., appellants, vs. the barge Columbia, etc., Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company," and numbered 172 on the docket of said Circuit Court of Appeals.

When the appeal came on for hearing in the Circuit Court of Appeals, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company moved the court to dismiss the appeal upon the grounds: First, the proceedings were irregular, because the appeal was taken by Balfour, Guthrie & Co. in their firm names, without naming the individuals composing the firm; and, second, because the decree was a joint decree, and Boyce and Larsen had not joined in the appeal, had not taken an appeal, and had not been barred of their right to appeal by any proceedings in the nature of summons and severance.

The motion to dismiss the appeal was heard by McKenna, the then circuit judge, and Hanford and Hawley, district judges, and the appeal was dismissed (Record, p. 399). The opinion of the court was delivered by Hanford, district judge, and will be found in the Record, page 388. The appellants moved for a rehearing, and this was granted (Record, p. 391). On the rehearing, an argument was had before McKenna, Gilbert and Ross, circuit judges. The motion to dismiss the appeal was overruled, and the decree of the District Court reversed, and the cause remanded to the District Court for further proceedings (Record, p. 406). The opinion of the court was delivered by Ross, circuit judge, and will be found in the Record, page 393. Mr.

Justice McKenna dissented from the conclusion of the court overruling the motion to dismiss the appeal, but concurred in the conclusion of the court as to the merits (Record, p. 406). Upon the motion to dismiss the appeal, the majority of the court held that the claims of each of the parties affected by the decree of the District Court were separate and distinct, and that the parties having such claims were not jointly affected by the decree.

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge were, first, that the Columbia was, from the inception of the voyage, unseaworthy; and, second, that the Columbia and the Ocklahama were, in law, one vessel; and that, in order to avail themselves of the benefit of the limited liability act, the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of. Upon the question of the seaworthiness of the barge and the cause of the accident, the District Court in its decree made the following findings of fact (Record, p. 84):

"First. That on October 21, 1892, the barge Columbia, being loaded with 8,898 sacks of wheat on her deck, owned by the respondents Balfour, Guthrie & Co., was taken in tow by the steamer Ocklahama at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

"Second. That said barge and steamer arrived in

safety at Astoria during the night of said October 21, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak. That said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

"Third. That said barge, about half an hour after striking said pontoon, was moved to a position behind said wharf, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and being listed against the dock was in a safe position.

"Fourth. That Marshal Short, master of said Ocklahama, and Gus Peterson, one of the crew of said Ocklahama, thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

"Fifth. That after the said barge had rested in this position against the dock for about an hour and a half, and while said Short and Peterson were in the hold of said barge, said John Ferguson on his own motion negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time, and for some time prior thereto, the tide in the Columbia river was ebbing.

"Sixth. That when said barge came to an even keel she remained in that position for a short time, when,

the tide having ebbed and she having no lateral support, said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away the deckhouse, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

"Seventh. That said Short and Peterson were unable to escape from the hold of said barge, and were drowned, and said William Boyce, who was in the hold of said barge, was injured by being struck by said cargo in attempting to reach the deck of said barge.

"Eighth. That said barge was seaworthy, and was at the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson, and the collapse was due to the exceptional strain to which the timbers were subjected in the unnatural position in which she was placed when thrown upon her side, and that the steamer Ocklahama did not in any way cause the said accident.

"Ninth. That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river, and there was no negligence on the part of the petitioners or either of them in employing the said John Ferguson; that the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge; that the said accident

resulting in the death of Short and Peterson, and injuries to Boyce, and the loss of the wheat loaded on the said barge occurred without the knowledge or privity of said petitioners or either of them."

The District Court, in the opinion delivered (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel; and, having held, as stated in the eighth finding of fact contained in the decree, that the Ocklahama did not, in any way, cause the accident, it was therefore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the District Court were by the Circuit Court of Appeals sustained and accepted as conclusive (Record, p. 404). The decree of the District Court was reversed solely because of the fact that the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the captain of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; and that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage, or whether the negligence of the Columbia alone caused the accident (Record, pp. 404-406).

The cause was remanded to the District Court for further proceedings.

On March 16, 1896, Malvina Short, Balfour, Guthrie & Co. and Sven Anderson filed in the District Court the mandate of the Circuit Court of Appeals (Record, p. 429), and moved that findings of fact be made as to the damage suffered by them, and that a decree be

entered against the Oregon Short Line & Utah Northern Railway Company, the Oregon Railway & Navigation Company and the steamer Ocklahama (Record, pp. 430, 431). After this motion was argued, and before it was decided, Balfour, Guthrie & Co. obtained leave to file a supplemental answer, setting up facts arising during the pendency of the proceedings (Record, p. 434). This answer (Record, p. 434) alleges that, in a suit commenced in the Circuit Court of the United States by Oliver Ames and others against the Union Pacific Railway Company and others, including the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company, S. S. H. Clark and others were appointed receivers of the Union Pacific system, including, among other companies, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and that said Clark and others, as such receivers, entered into the possession of all of the property of said companies, and proceeded to operate the same. That, on the 25th of June, 1894, there was filed in the Circuit Court of the United States for the District of Oregon a bill of complaint, wherein the Farmers' Loan & Trust Company was complainant, and the Oregon Railway & Navigation Company, the Oregon Short Line & Utah Northern Railway Company and others were defendants, alleging that the Oregon Railway & Navigation Company was insolvent, and praying for the appointment of a receiver for said corporation; and that, on the 3d day of July, 1894, in said court and cause, Edwin McNeill was appointed receiver of the Oregon Railway & Navigation Company, afterwards qualified as such, and entered into the operation of all the prop-

erty of said company. That, on the 1st day of September, 1894, in the Circuit Court of the United States for the District of Oregon, a bill of complaint was filed by John F. Dillon, as trustee, against the Oregon Short Line & Utah Northern Railway Company and others, praying, among other things, that receivers be appointed for the property of the Oregon Short Line & Utah Northern Railway Company, and that, afterwards, in said court and cause S. S. H. Clark and others were appointed such receivers, and entered into possession of all of the property of the Oregon Short Line & Utah Northern Railway Company; that the steamer Ocklahama, mentioned in the pleadings, was then in the custoday and possession of Edwin McNeill as receiver of the Oregon Railway & Navigation Company. The said supplemental answer then prayed that the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company be required forthwith to file a new and additional stipulation for the appraised value of the said steamer Ocklahama, at the time of the accident to the barge Columbia. To this supplemental answer (Record, pp. 437, 438) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed exceptions, on the grounds, first, that the district court was without jurisdiction to hear and determine the matters presented by said supplemental answer, or to grant the relief, or any part of the same, prayed for in said supplemental answer; second, that the district court had no jurisdiction over the steamer Ocklahama, or over the value of said steamer; third, that the relief prayed for in said supplemental answer is not in accordance with the opinion of the said circuit court of appeals in this case,

and is inconsistent therewith; and, fourth, that, under the act of congress providing for the limitation of liability, the railway companies were not obliged to pay into the court the appraised value of the said steamer Ocklahama, or were not obliged to turn over to trustees the said steamer.

These exceptions came on to be heard, and were overruled (Record, p. 439).

On May 22, 1896, a rehearing was had upon the exceptions to the supplemental answer of Balfour, Guthrie & Co., and said exceptions were sustained (Record, p. 442), and, on motion of Balfour, Guthrie & Co., the said parties were allowed to file an amended and supplemental answer. At the same time came on for hearing a motion from Balfour, Guthrie & Co. for an order directing the marshal to seize the Ocklahama, and said motion was denied, for the reason stated, that no formal order of the court was required to warrant the marshal, as part of the proceedings in the cause, to seize and hold said steamboat. Thereupon, Balfour, Guthrie & Co. filed an amended supplemental answer (Record, p. 442). This answer makes substantially the same allegations as were made in the original supplemental answer, and to this answer (Record, pp. 449, 450) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed exceptions, on the same ground as the exceptions filed in the original supplemental answer. These exceptions afterwards came on for hearing, and were sustained (Record, p. 451).

Without any other or additional pleadings being filed, or any independent libel being filed, a warrant of arrest against the Ocklahama (Record, p. 448) was issued,

and the Ocklahama was taken into custody by the marshal, and notice of such seizure was published in a newspaper in Portland, Oregon (Record, pp. 445, 447).

On the 30th day of July, 1896, and after the seizure of the Ocklahama, the Oregon Railway & Navigation Company (Record, p. 454) filed a motion for an order directing the marshal of the court to return the Ocklahama to the possession of Edwin McNeill, receiver of the Oregon Railway & Navigation Company. Said motion was based on the following grounds: First, that no warrant of arrest of the said Ocklahama was ever lawfully issued, and that no libel was filed in the clerk's office against the steamer Ocklahama; and, second, that the court was without jurisdiction to seize the Ocklahama in this proceeding, and was without power or authority in this cause to issue process against the Ocklahama, or to cause the Ocklahama to be seized.

On the 30th day of July, 1896, Edwin McNeill, receiver of the Oregon Railway & Navigation Company (Record, p. 455), filed his petition, wherein it was alleged that, on or about June 1, 1885, the Oregon Railway & Navigation Company made, executed and delivered to the Farmers' Loan & Trust Company a deed of trust of all the property of the Oregon Railway & Navigation Company, to secure an issue of bonds made by the Oregon Railway & Navigation Company, and that, at all times since June 1, 1886, there have been outstanding and in the hands of various persons over $12,000,000.00 of said bonds so secured by said mortgage; that default had been made in the payment of the interest upon said bonds, and, in accordance with the provisions of said mortgage, the principal of said mortgage had been declared to be due; and that, on

the 25th day of June, 1894, the Farmers' Loan & Trust Company, as trustee, had commenced a suit in the Circuit Court of the United States for the District of Oregon against the Oregon Railway & Navigation Company and others, for the purpose of foreclosing said mortgage; and that in said suit the said McNeill had been appointed receiver of the property of the Oregon Railway & Navigation Company; that, among other property owned by the Oregon Railway & Navigation Company, at the time of the execution of said deed of trust, was the steamer Ocklahama; that the home port of the said Ocklahama was the port of Portland, Oregon, and that the said Ocklahama, at the time of making said deed of trust, was enrolled or registered at the office of the collector of customs for the port of Portland, Oregon; and that the said deed of trust made to the Farmers' Loan & Trust Company was recorded in the office of the collector of customs at Portland, Oregon. That prior to the filing of the petition, the marshal of the court had entered upon the said Ocklahama, and had taken possession of the same, and had represented that the said boat was so taken into his possession as the result of process issuing out of the district court in this proceeding. The petition of the said McNeill then represented that no libel against the steamer Ocklahama had ever been filed in the clerk's office; that no warrant of arrest had ever been issued in this proceeding, calling upon the owners or persons claiming the said Ocklahama to answer any libel filed in this or any other suit, and thereupon prayed the court to direct the marshal to return the said Ocklahama to the possession of the said McNeill.

Balfour, Guthrie & Co. filed exceptions to the peti-

tion of McNeill on the ground that the said petition was immaterial, irrelevant and impertinent, and prayed that the petition be denied (Record, p. 457). The matter came on for a hearing, and, after argument, the court denied the motion of the Oregon Railway & Navigation Company and of McNeill as receiver, and refused to order the return of the Ocklahama to McNeill.

On the 25th day of September, 1896, there was filed a petition of the Oregon Railroad & Navigation Company (Record, p. 458). This petition recites that, on the 1st day of June, 1885, the Oregon Railway & Navigation Company did make, execute and deliver to the Farmers' Loan & Trust Company a mortgage bearing date the 1st day of June, 1885, whereby the said Oregon Railway & Navigation Company did mortgage to the Farmers' Loan & Trust Company all of its property, including the steamer Ocklahama, to secure a certain series of mortgage bonds; that, under and in pursuance of said mortgage, there were issued, and at the date of the decree afterwards mentioned, outstanding consolidated mortgage bonds to the amount of $12,583,000.00; that, on or about the 1st day of December, 1893, the Oregon Railway & Navigation Company did make default in the payment of the interest upon said bonds, and that such proceedings were afterwards had under said mortgage; that the principal of all of said bonds secured by said mortgage became due and payable; that after such default, and after the principal of said mortgage bonds became due, there was, on the 25th day of June, 1894, begun in the Circuit Court of the United States for the District of Oregon a suit in equity to foreclose said mortgage, in which suit the Farmers' Loan & Trust Company was complainant, and the Ore-

gon Railway & Navigation Company and others were defendants, and thereafter, in said suit, Edwin McNeill was appointed receiver of all of the property of the Oregon Railway & Navigation Company, including the steamboat Ocklahama, and duly qualified as such receiver and entered into the possession of all the property of the Oregon Railway & Navigation Company, including the Ocklahama, and remained in the possession of said property and said steamer until said steamer was taken from the custody of said McNeill by the marshal. That in said suit, so commenced to foreclose said mortgage, such proceedings were thereafter duly had on the 10th day of August, 1895, a decree was duly entered in said court, whereby it was ordered that, in default of certain payments therein mentioned, all of the property of the Oregon Railway & Navigation Company, including the said steamer Ocklahama, should be sold as an entirety, and that, afterwards and on the 9th day of July, 1896, all of said property was sold at public auction to A. Marcus, Charles S. Fairchild and C. Beaman for the sum of $0,437,250.00, and that, on the 16th day of July, said sale was confirmed and deeds were executed to the said Marcus and others; that, afterwards and on the 17th day of August, said Marcus, Fairfield and Beaman conveyed to the Oregon Railroad & Navigation Company all of the property purchased by the said Marcus, Fairchild and Beaman, including the said steamer Ocklahama, and that the Oregon Railway & Navigation Company, in pursuance of said decree, did, on the said 17th day of August, 1896, make, execute and deliver to the Oregon Railroad & Navigation Company a due and proper bill of sale of the said steamer Ocklahama; that no person had ever claimed

the said steamer Ocklahama as owner, and that the petitioner had no previous opportunity to appear and claim said steamer. Whereupon, the petitioner prayed that the Oregon Railroad & Navigation Company might be allowed to intervene for the purpose of protecting its interest in the said steamer, and might be allowed to claim said steamer as owner, and to appear herein and defend as such owner, and that the said steamer Ocklahama be appraised, in order that the petitioner might give bond for such appraised value and obtain a release of said steamer. On September 25 (Record, p. 462) the petition of the Oregon Railroad & Navigation Company came on for hearing, and, after argument, the court ordered that the Oregon Railroad & Navigation Company be allowed to intervene in the proceeding for the purpose of protecting its interest in the Ocklahama, and be allowed to claim the said steamer as owner, and to appear therein and defend as such owner, and that appraisers be appointed to determine the value of the said Ocklahama.

On the 30th day of September, 1896, the Oregon Railroad & Navigation Company filed its claim as owner (Record, p. 462), and gave its stipulation for costs (Record, p. 463).

On October 1, 1897 (Record, p. 464), the Oregon Railroad & Navigation Company filed its petition, alleging that it was entitled to the possession of the Ocklahama; that no warrant of arrest of the Ocklahama was ever lawfully issued, and no libel filed in the clerk's office against the Ocklahama; that the court was without jurisdiction to arrest the Ocklahama in said proceeding; that said proceeding was a suit *in personam;* and that to seize or undertake to seize the Ocklahama

in said proceeding was an attempt to change a proceeding *in personam* arising out of a collision in a proceeding *in rem*, contrary to the admiralty rules and practice of this court, and praying that the Ocklahama might be returned to the said Oregon Railroad & Navigation Company.

On the 22d day of October, the Ocklahama in the meantime having been appraised, the Oregon Railroad & Navigation Company gave its bond for the appraised value of the Ocklahama (Record, p. 467), and the court thereupon made an order directing the marshal to release the vessel and return the same to the possession of the claimant, the Oregon Railroad & Navigation Company (Record, p. 468).

Having been allowed to defend as the claimant and owner of the steamer Ocklahama, the Oregon Railroad & Navigation Company found on file in the court no libel against the steamer Ocklahama, and no pleadings and no libel or pleadings of any kind whatsoever requiring an answer, save the answers of Balfour, Guthrie & Co., Anna C. Larsen, Malvina Short, as administratrix, and Sven Anderson, as administrator, to the petition to limit liability, filed by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, when said proceeding was commenced. The Oregon Railroad & Navigation Company, therefore, on the 28th day of July, 1897, filed its answers to the answer of Balfour, Guthrie & Co. (Record, p. 475); to the answer of Malvina Short (Record, p. 481); to the answer of Sven Anderson (Record, p. 488), and to the answer of Anna C. Larsen (Record, p. 495). The first six articles in each of these answers are the same, and by these articles is alleged the incorporation

of the Oregon Railway & Navigation Company; the making of the mortgage to the Farmers' Loan & Trust Company on the 1st day of June, 1885, to secure the bonds issued by the Oregon Railway & Navigation Company; the recording of said mortgage in the office of the collector of customs of the port of Portland, the port of registry of the said steamer Ocklahama; the default in the payment of interest due on the said mortgage; the institution of the suit to foreclose said mortgage; the appointment of McNeill as receiver of the property; the decree of the court foreclosing said mortgage; the sale to Marcus, Fairchild and Beaman, and the making of deeds to such persons of all of the property of the Oregon Railway & Navigation Company, including the steamer Ocklahama; the sale by Marcus, Fairchild and Beaman to the Oregon Railroad & Navigation Company of all the property, and the bill of sale from the Oregon Railway & Navigation Company, to the Oregon Railroad & Navigation Company, made in pursuance of the decree of the court, of the steamer Ocklahama. Following these allegations in each of the answers and contained in the seventh and following articles in each of said answers, are denials of the facts alleged in the answers of Balfour, Guthrie & Co., Short, Anderson and Larsen, and allegations of the facts as to the cause of the accident to the Columbia.

This part of each of the answers alleges that the Oregon Short Line & Utah Northern Railway Company was in the possession of all of the property of the Oregon Railroad & Navigation Company, including the Ocklahama and the barge Columbia, and had sole and exclusive possession and management of said boats during the month of October, 1892, that, on the 19th

day of October, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat, to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that said barge was under the charge of a captain, who had no connection with any other boat or vessel other than the Columbia, and that the captain of said barge, for and on behalf of the said Columbia, executed and delivered to said Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded; that the said barge Columbia was, on the 19th day of October, 1892, taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the boneyard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that, on the afternoon of the 21st day of October, 1892, the steamboat Ocklahama took said barge Columbia in tow for the purpose of towing the said barge Columbia from the boneyard in Portland to the dock of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company, at Astoria, Oregon, at which said dock the said Ocklahama was to leave the said barge, and was not expected or intended to further tow said barge; that no contract was made with the said Ocklahama by the said Balfour, Guthrie & Co., for the towage of the said barge; that, on the arrival of the said Ocklahama with the said barge at the dock at Astoria, the said Ocklahama was under orders to return immediately to Portland, leaving the said barge along the said dock. The answers then allege the facts concerning the voyage to Astoria and the striking of the pontoon, and the taking

of the barge behind the dock, and the placing of the same in a safe position alongside of the dock, as found by the decree of the district court (Record, p. 84). The answers then allege that, after the said barge had rested against the dock for about an hour and a half, the master of the barge negligently caused the cargo on the deck of the barge to be shifted until the barge was on an even keel, and was no longer resting against this dock; that, by reason of such negligence, the barge was caused to list, and the loss of the wheat and the injury to Short and Peterson thereupon followed; that, while the barge remained against the dock, the cargo of the said barge might easily have been removed from the dock; that the steamer Ocklahama did not, in any way, cause the said injury; that the same was caused solely by reason of the negligence of the captain of the barge as aforesaid; that the injury to said wheat was caused solely by a peril over which the said Ocklahama and her officers and crew had no control, and that said injury could not have been prevented by the exercise of any care on the part of the said Ocklahama or her officers and crew; that it was not intended that the said Ocklahama should tow the said barge Columbia any further than to the said dock at Astoria, Oregon, and that said barge was to be delivered to the ship Westgate, by some other tug, and that no contract was ever made with the said steamer Ocklahama or her owners for the towage of the said barge Columbia to the said Westgate, and that the only contract existing for the towage of the said barge was that resulting by operation of law from the facts hereinbefore stated; that no libel had ever been filed in the cause against the said Ocklahama or her owners or charterers. The answers thereupon pray that the right, title and interest of the

Oregon Railroad & Navigation Company in and to the Ocklahama may be declared to be superior and prior to that of Balfour, Guthrie & Co., Short, Anderson and Larsen, and that the said Ocklahama may be restored to the possession of the said Oregon Railroad & Navigation Company, and that the Oregon Railroad & Navigation Company may have such other and further relief as may be just and equitable.

To these answers, Malvina Short (Record, p. 502), Sven Anderson (Record, p. 503) and Anna C. Larsen (Record, p. 504) filed exceptions. These exceptions are identical in form, and are the following:

First—That the court has no jurisdiction to allow the said answer of the Oregon Railroad & Navigation Company to be filed in this cause, or to entertain or to consider the same.

Second—That the Oregon Railroad & Navigation Company is not a proper party to this cause, and is not entitled to be heard.

Third—That the answer of the Oregon Railroad & Navigation Company does not state facts sufficient to constitute any cause of suit or ground of defense, or to entitle the Oregon Railroad & Navigation Company to any relief.

Balfour, Guthrie & Co. (Record, p. 504) filed their exceptions to the answer of the Oregon Railroad & Navigation Company, said exceptions being the following: "Except to the whole of the said answer, for that the same is impertinent; except to that portion of the answer which commences with the article or paragraph thereof designated number seven, and extends to conclusion of the said answer, for that the same is res judicata."

On August 2, 1897, a decree was entered by the district court sustaining the exceptions of Balfour, Guthrie & Co. and the other respondents to the answers of the Oregon Railroad & Navigation Company (Record, p. 505). On October 11, 1897, the Oregon Railroad & Navigation Company filed a petition (Record, p. 509) to set aside the decree, on the ground that no hearing was had and said decree was entered without notice. As the result of this petition, the decree of August 2, 1897, was set aside, and a rehearing was had (Record, p. 513).

On December 20, 1897, the exceptions to the answers of the Oregon Railroad & Navigation Company came on for hearing, and said exceptions were sustained, and thereupon the court ruled that the Oregon Railroad & Navigation Company would not be permitted to introduce evidence in support of its said several answers; and thereupon findings were made as to the damages suffered by Balfour, Guthrie & Co., Malvina Short as administratrix, Sven Anderson as administrator, and Anna C. Larsen; and it was found that Balfour, Guthrie & Co. had suffered damages in the sum of $16,018.79; that Malvina Short, as administratrix, has suffered damages in the sum of $5,000.00; that Sven Anderson, as administrator, had suffered damages in the sum of $3,000.00, and that Anna C. Larsen had not sustained any damage. And thereupon an order was made for the distribution of the appraised value of the Ocklahama, and the Oregon Railroad & Navigation Company was required to pay into the registry of the court for distribution the sum of $8,600.00, the appraised value of the said steamer; and further ordered that, when said sum was paid, the petition to limit liability of the Oregon Railway & Navigation Company and the Oregon Short

Line & Utah Northern Railway Company would be allowed (Record, p. 513).

From this decree the Oregon Railway & Navigation Company, the Oregon Sort Line & Utah Northern Railway Company and the Oregon Railroad & Navigation Company appealed to the Circuit Court of Appeals (Record, pp. 516-562).

The appeals so taken were heard by the Circuit Court of Appeals for the Ninth Circuit, and the decree of the district court was, in all respects, affirmed. The opinion of the circuit court of appeals will be found in the Record, p. 575.

The Oregon Railroad & Navigation Company, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, filed a petition for rehearing. On the 2d day of March, 1899 (Record, p. 593), said petition for rehearing was denied.

On the 6th day of March, 1899 (Record, p. 594), the Oregon Railroad & Navigation Company filed in the circuit court of appeals its petition for an appeal to this court, and, in connection with its appeal, with said petition, and on the same day (Record, p. 595), filed an assignment of errors. On the same day (Record, p. 601) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed their petition for an appeal to this court, and in connection with said petition (Record, p. 603), filed their assignments of error. Gilbert, circuit judge, on the 4th day of April, 1899, duly allowed the said appeals, as shown by the orders appearing in the Record, pp. 608, 609.

In connection with its appeal, the Oregon Railroad

& Navigation Company made and now makes the following

ASSIGNMENT OF ERRORS.

First—The Circuit Court of Appeals erred in affirming the decree made and entered by the District Court of the United States for the District of Oregon on August 2, 1897, and re-entered on December 20, 1897.

Second—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the said District Court had no jurisdiction under the mandate of the United States Circuit Court of Appeals entered in said District Court on March 16, 1896, to enter any decree imposing any liability upon this appellant or the steamer Ocklahama.

Third—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the said District Court erred in seizing the steamer Ocklahama, and in making the decree appealed from, because the said District Court was without power or authority in this cause to issue process against the Ocklahama, or to cause the Ocklahama to be seized.

Fourth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred

in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in seizing the Ocklahama and in making said decree, because no libel in rem had, or ever has, been filed in this proceeding against the Ocklahama.

Fifth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in seizing the Ocklahama, and in entering the decree so affirmed for the reason that this proceeding was commenced by The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company to limit their personal liability, and was a suit in personam, and the seizure of the said Ocklahama changed the said proceeding in personam arising out of a collision into a proceeding in rem, and said seizure in this proceeding and said decree so affirmed was contrary to the admiralty rules and practice of the Supreme Court of the United States.

Sixth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in de-

creeing that the steamer Ocklahama, or her value, should be surrendered, for the reason that there is no evidence showing that the towage services of the steam tug Ocklahama were not fully performed when the said barge Columbia was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said steam tug Ocklahama were, at the time of the alleged injuries to the respondents, and each of them, fully performed.

Seventh—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on the 2d of August, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in decreeing that the steamer Ocklahama and the barge Columbia constituted one vessel within the meaning of the act of congress entitled "An act to limit the liability of ship owners and for other purposes, approved March 3, 1851," and the various statutes in addition thereto and amendatory thereof.

Eighth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in seizing the Ocklahama and in decreeing that the said Ocklahama, or her value, should be surrendered, for the reason that if The Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern

Railway Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the Columbia and of the matters and things done by the said petitioners to limit their liability, then, and in that event, it was the duty of the District Court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and have allowed the said Robert Balfour and others, and the said administratrix of the estate of Marshall B. Short, and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they, or either of them, might have been advised against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, or to have confined the relief granted to said respondents, or either of them, to personal decrees and judgments against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact, and the Circuit Court of Appeals by its decree should have so ordered.

Ninth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Robert Balfour and others to the answer of the Oregon Railroad & Navigation Company to the answer of the said Robert

Balfour and others, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Tenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Anna C. Larsen, mother of John August Peterson, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Anna C. Larsen, mother of John August Peterson, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Eleventh—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of

December, 1897, for the reason that the District Court erred in sustaining the exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Sven Anderson, administrator of the estate of John August Peterson, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Twelfth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Malvina Short, administratrix of the estate of Marshall B. Short, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Thirteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said court on the 20th day of December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Robert Balfour and others, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial upon the issues made by said answer and of its day in court.

Fourteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial upon the issues made by said answer and of its day in court.

Fifteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of

December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial on the issues made by said answer and of its day in court.

Sixteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in decreeing that Robert Balfour and others had any interest in or lien upon the steamer Ocklahama as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Robert Balfour and others, such answer of appellant being filed July 28, 1897.

Seventeenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court

erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, had any interest in, or lien upon the steamer Ocklahama, as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, such answer of appellant being filed July 28, 1897.

Eighteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in decreeing that Malvina Short, administratrix of the estate of Marshall B. Short, deceased, had any interest in or lien upon the steamer Ocklahama as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, such answer of the appellant being filed July 28, 1897.

Nineteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that after the seizure of the Ocklahama there was no hearing before any court of any defense undertaken to be made by the said Ocklahama, or by this appellant.

Twentieth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in holding that the proceedings had prior to the seizure of the Ocklahama constituted an adjudication against the Ocklahama, and all persons claiming any interest in the said Ocklahama.

Twenty-first—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in finding that as the result of the proceedings had in this suit, the respondents, Robert Balfour et al., Malvina Short, administratrix, and Sven Anderson, administrator, had any interest in or lien upon the steamer Ocklahama superior to the right, title, interest and estate of this appellant in the said vessel, acquired as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the several answers of this appellant, filed in the District Court July 28, 1897.

ARGUMENT.

For the convenience of the court, a detailed statement has been given herein of all the steps taken by the vari-

ous parties to this suit. For the purposes of the argument, the facts may be more shortly stated.

This proceeding was instituted by the Oregon Railway & Navigation Company as the owner of the Columbia, and by the Oregon Short Line & Utah Northern Railway Company as the lessee thereof, to limit their personal liability for injuries received by the respondents through a collision between the Columbia and the bottom of the Columbia river. No attempt was made by the petitioners to limit their liability for any injuries done by the Ocklahama. The Ocklahama was not surrendered, and her value was not paid into court. Had this been done, the entire litigation, so far as it affects the Ocklahama and the Oregon Railroad & Navigation Company, would have been avoided.

During the first trial in the District Court, the respondents made no attempt to seize the Ocklahama, or did not seek to have her brought into court. The principal contention made by all the respondents, as shown by their answers to the petition, was that the Columbia was old and rotten and was overloaded. The amounts sought to be recovered by the respondents were far in excess of the value of the Ocklahama; and therefore the respondents were not and could not have been satisfied by anything less than full personal liability on the part of the railway companies instituting the proceeding.

After the District Court held against the respondents on the question of the condition of the Columbia, the respondents contended that no limitation of liability could be had without a surrender of the Ocklahama also.

Upon this contention the District Court decided against the respondents on the ground that the Ockla-

hama and the Columbia were two vessels; that the contract of carriage had been made by the Columbia, and that the Ocklahama was without fault.

The Circuit Court of Appeals, upon the first appeal, held that the Columbia and the Ocklahama constituted one vessel; that the question as to which was at fault was immaterial, and that in order to obtain a limitation of liability, both vessels must be surrendered.

During the pendency of the appeal, receivers of the property of both of the petitioners had been appointed. When the mandate was entered in the District Court, the petitioners were no longer able to surrender the Ocklahama and thus limit their personal liability; and, being insolvent, the petitioners no longer cared about personal liability.

The position of the respondents also changed. They no longer sought personal liability, but wished to have the Ocklahama brought into court and be subjected without any further hearing to the demands of the respondents to the same extent as if the proceeding from the beginning had been one in rem against the Ocklahama.

Acting upon the suggestion of the respondents, the District Court, on receiving the mandate of the Circuit Court of Appeals, did not treat the proceeding as a personal proceeding, as one *in personam* between the original petitioners and the respondents, and did not enter judgment against the petitioners, but, on the contrary, that court caused a seizure to be made of the Ocklahama. E. McNeill, then receiver of the Oregon Railway & Navigation Company, appointed in a suit to foreclose a mortgage made in 1885 upon all of the property of the Oregon Railway & Navigation Com-

pany, filed his petition alleging his interest, and sought to have the vessel returned to him. (Record, p. 455.) This petition was denied. (Record, p. 458.) The Oregon Railroad & Navigation Company purchased the Ocklahama at the foreclosure sale under said mortgage, and after such purchase appeared and filed a petition setting up its interest in the Ocklahama, alleging that such interest was superior to the lien of any decree rendered in the suit, that no libel was ever filed in the clerk's office against the steamer Ocklahama, and that to seize, or undertake to seize, the Ocklahama in this proceeding was to attempt to change a proceeding *in personam*, arising out of a collision, to a proceeding *in rem*, contrary to the admiralty practice of this court, and praying that the Ocklahama be returned to the petitioner. (Record, p. 464.) Afterwards the Oregon Railroad & Navigation Company gave bond for the value of the Ocklahama and undertook to defend by filing answers to the only pleadings on file which would seem to require an answer, namely, the answers of the respondents to the petition to limit liability. The answers of the Oregon Railroad & Navigation Company (Record, pp. 475, 481, 488, 495) set up two main defenses:

First. That the Oregon Railroad & Navigation Company was the purchaser of the Ocklahama at a foreclosure sale had under a mortgage duly recorded and made in 1885, and therefore, standing in the shoes of the trustees of that mortgage, had a right in the Ocklahama superior to the lien of any judgment that could be rendered in any personal proceeding against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company.

Second. That the alleged injuries were received after

the towage contract of the Ocklahama was performed, and without any negligence on the part of the Ocklahama; and that therefore the Ocklahama was not liable therefor.

Exceptions were filed to these answers by all of the respondents on the ground that both defenses were immaterial and impertinent; and that, second, the defense was *res judicata*. (See exceptions of Balfour, Guthrie & Co., Record, p. 473.) These exceptions were sustained, and the Oregon Railroad & Navigation Company was not allowed to defend. A decree was thereupon entered requiring the Oregon Railroad & Navigation Company to pay into court the appraised value of the Ocklahama, and this decree was affirmed by the Circuit Court of Appeals.

The reasons for sustaining the decree of the District court stated in the opinion of the Circuit Court of Appeals are extremely inconsistent and show clearly that it is impossible to sustain that decree. It is stated in that opinion (Record, p. 578): "The proceeding, therefore, is a suit in equity in admiralty, not to subject property to liens," etc. Yet it is held in effect that the proceedings had prior to the seizure of the Ocklahama established a maritime lien against her, and that her owner could not be heard after seizure for the purpose of denying the existence of such lien. It is further stated in the opinion (Record, p. 579): "Petitioners have become insolvent. Their assets have been sold upon foreclosure of mortgages. They have nothing now wherewith to meet the demands arising out of the accident." Because of the above facts it was regarded as equitable that the Ocklahama, sold upon such mortgage foreclosure, should be taken away from her then owner and sub-

jected to the demands arising out of the collision without giving her owner any opportunity to defend. The fact that the petitioners had nothing which was subject to the demands of the respondents is apparently assigned as the reason why the court should take possession of the Ocklahama, then belonging to this appellant, and make her subject to such demands. The equities of the case appealed so strongly to the Court of Appeals that the court stated (Record, p. 579) that the procedure whereby such result was obtained was wholly immaterial. The respondents could not be satisfied without the Ocklahama, and therefore the court must take the vessel, irrespective of right or procedure. On page 580 of the opinion it is said: "When the Oregon Railroad & Navigation Company appeared in the District Court in the proceedings subsequent to the mandate from this court, it attempted to litigate a matter which was already adjudicated, to which its predecessor in interest had been a party, and by which it, as successors, was bound."

When was there prior adjudication? The Circuit Court of Appeals clearly held that such prior adjudication took place before the seizure of the Ocklahama, and it certainly, after the seizure, expressly refused to further hear the matter. In effect the decree of the Circuit Court of Appeals, made upon the first appeal, was regarded as being equivalent to a decree *in rem* against the Ocklahama. The appellant insists—

First. That the title of the Oregon Railroad & Navigation Company to the Ocklahama could only be divested by a decree *in rem* and that such title is superior to any decree which could be rendered in the personal proceeding.

Second. That no valid decree *in rem* could be ren-

dered in the present proceeding for the following reasons:

(a) The suit was one to limit the personal liability. No amendment thereto was ever made, and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.

(b) No libel was ever filed against the Ocklahama, and after her attempted seizure this appellant was not allowed to defend.

(c) The suit was for damages by a collision and was commenced *in personam*, and no amendment could be made changing it into an action *in rem*.

Third. No lien in favor of the respondents exists against the Ocklahama; and the facts alleged in the answers constituted a good defense.

To treat the decree of the Circuit Court of Appeals upon the first appeal as authorizing or requiring the entry without further hearing of a judgment *in rem* against the Ocklahama is to overlook every distinction between actions *in personam* and actions *in rem*, and is to ignore many familiar and well-settled principles applicable to proceedings *in rem*. These principles are so well settled that we feel justified in calling them to the attention of this court only because the Circuit Court of Appeals absolutely ignored them.

I.

The title of The Oregon Railroad & Navigation Company to the Ocklahama could only be divested by a decree *in rem* and that such title is superior to any decree which could be rendered in the personal proceeding.

A person injured by a maritime tort or by the violation of a maritime contract may, and usually does, have the following three remedies open to him:

First. An action at law for damages.

Second. An action *in personam* in admiralty against the wrongdoer.

Third. An action *in rem* against the vessel whose agents commit the tort or violate the contract.

The distinction between actions in rem and actions *in personam* is sharp and well defined. In an action *in rem* the remedy is limited to the vessel or to the stipulation as a substitute for it, and every person interested in the vessel is bound by the judgment. In an action *in personam* the judgment recovered is a personal judgment against the defendants, and the only persons bound by the proceedings are those who are parties thereto.

In Benedict's Admiralty, 3d Edition, Section 359, the distinction is stated in the following language: "Suits *in rem* are against the thing itself, and the relief sought is confined to the thing itself, and does not extend to any person. Suits *in personam*, on the other hand, are against the person, and the relief is sought against him, without reference to any specific property or thing. In a suit *in rem*, unless some one intervenes and assumes the responsibilities of the controversy, the power and process of the court is confined to the thing itself, and does not reach either the person or the other property of its owner. In a suit *in personam* the court is confined to the right and liabilities of the person; and, in its execution, proceeds against his property generally, without any regard to its relation to the matter in controversy."

In Sabine, 101 U. S. 388, Mr. Justice Clifford, speak-

ing for the court, says: "Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo, or both, and in which the thing to be made responsible is proceeded against as the real party, but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

A judgment *in personam* in admiralty is of no higher character than a judgment at law or a decree in equity, and is subject to the same manner and the same priority. To hold that a judgment *in personam* has the same priority as a judgment which might be rendered *in rem* in the same cause of action is simply to disregard every distinction between actions *in personam* and actions *in rem*. A person having a cause of action in admiralty upon which he might sue either *in rem* or *in personam* cannot proceed *in personam* to establish his cause of action and then claim that the personal judgment so obtained would take rank against the offending boat in the same order as a maritime lien arising as the result of the offense committed; but in order to obtain the priority given to him by his maritime lien he must proceed *in rem* and defeat not only the owner but all lienors who may appear and defend. To give to a decree in personam against the owner the effect to any extent whatsoever of a decree in rem against the vessel would cause all suits in admiralty to be commenced *in personam* in the hope that a possibly insolvent owner would not interpose defenses which would undoubtedly be made by his creditors if the vessel were seized. The right of

junior lienors to defend upon the merits cannot be defeated by any such procedure.

In this country a maritime lien can be executed and divested only by a proceeding against the thing itself instituted in an admiralty court of the United States. Upon this subject Mr. Justice Grier, in Vandewater v. Mills, 19 How. 89, says:

"The maritime 'privilege' or lien is adopted from the civil law and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law and is peculiar to the process of courts of admiralty."

A maritime lien, as stated by Mr. Justice Story in the Nestor, is: "The right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors." A "concurrence of creditors" can take place only as a result of seizure in a proceeding to enforce a lien, thus giving notice to all the world of the proceedings. It follows, therefore, that there can be no jurisdiction in rem without seizure.

The Alliance, 70 Fed. Rep. 273.

The Brig Ann, 9 Cranch, 289.

There can be no "concurrence of creditors" without a hearing in which each creditor is allowed to assert his lien on the fund and attempt to defeat the lien of others. As a result no valid judgment in rem can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

As a result of the purchase of the Ocklahama at the

foreclosure sale alleged in the answers of the Oregon Railroad & Navigation Company, that company succeeded not simply to the interest of the Oregon Railway & Navigation Company at the time of the sale, but also to the interest of the Farmers' Loan & Trust Company, acquired as a result of the making of the mortgage.

Jones on Mortgages, 3d Edition, Sec. 1653.

Pomeroy on Jurisprudence, Sec. 1228.

The law is thus stated by the section cited, in Jones on Mortgages:

"Title acquired by foreclosure relates back to the date of the mortgage so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor, as it stood at the time of the making of the mortgage."

It is not claimed by the Oregon Railroad & Navigation Company, as stated in the opinion of the Circuit Court of Appeals (Record, p. 579), that such company was an innocent purchaser without notice of the possibilities of any maritime lien being asserted against the Ocklahama, but it is claimed that the Oregon Railroad & Navigation Company stepped into the shoes of the Farmers' Loan & Trust Company, and is entitled to the same rights that the Farmers' Loan & Trust Company had, and that the title of the Oregon Railroad & Navigation Company could be divested only by the same procedure as would have been necessary to have cut off the lien of the Farmers' Loan & Trust Company upon the Ocklahama, acquired as the result of the making of

the mortgage of June 1, 1885, namely, by a suit in rem against the Ocklahama.

The mortgage of the Ocklahama to the Farmers' Loan & Trust Company, made on June 1, 1885, is on familiar principles, repeatedly stated by the Circuit Court of Appeals for the Ninth Circuit, superior to any personal judgment against the Oregon Railway & Navigation Company arising out of any contract made or tort committed by that company after June 1, 1885.

The Farmers' Loan & Trust Company v. Northern Pacific Railroad Co., 79 Fed. Rep. 227.

The Northern Pacific Railroad Co. v. Heflin, 83 Fed. Rep. 93.

Farmers' Loan & Trust Co. v. Longworth, 83 Fed. Rep. 336.

Farmers' Loan & Trust Co. v. Nestelle, 79 Fed. Rep. 748.

The superiority of the lien of the mortgage of the Farmers' Loan & Trust Company to personal judgments against the Oregon Railway & Navigation Company would be valueless unless, as the result of the sale under foreclosure, the purchaser took a title superior to the lien of such judgments against the Oregon Railway & Navigation Company. And such is the rule of law stated by the authorities cited. The Oregon Railroad & Navigation Company therefore acquired the Ocklahama as the result of the foreclosure sale, free and clear from the lien of any personal judgments or adjudications which had been rendered against the Oregon Railway & Navigation Company from June 1, 1885, to the date of the foreclosure sale.

The Oregon Railroad & Navigation Company, purchasing the Ocklahama at a sale under such mortgage,

necessarily took the Ocklahama subject to all maritime liens against the vessel then existing and which should be asserted within a reasonable and proper time after the foreclosure sale. The position taken by the Oregon Railroad & Navigation Company, however, is that no matter how many causes of action might exist against the Oregon Railway & Navigation Company giving rise to maritime liens against the Ocklahama, the title of the Farmers' Loan & Trust Company in the Ocklahama and of the Oregon Railroad & Navigation Company, as its successor, could not be divested as the result of the prosecution of any such cause of action against the Oregon Railway & Navigation Company, but could only be divested by a decree rendered in a proceeding ***in rem*** against the Ocklahama after seizure and a hearing had as a result of such seizure, and that no decree rendered in a personal action against the Oregon Railway & Navigation Company, although finding facts out of which a maritime lien might arise, could in any way divest the interest of the Farmers' Loan & Trust Company in the Ocklahama. In this country a maritime lien can be executed and divested only by a proceeding ***in rem*** instituted in an admiralty court of the United States.

Vandewater v. Mills, 19 How. 89.

Courts of law, courts of equity and courts of admiralty in actions ***in personam*** cannot execute maritime liens as a result of finding facts in such personal actions which, if found in an action in admiralty, would give rise to a lien. The facts found in such personal action do not bind the thing itself and cannot affect the rights in the thing of any persons other than those who are parties to such personal proceeding.

In the present case, neither the Farmers' Loan & Trust Company nor its successor, the Oregon Railroad & Navigation Company, was a party to the proceeding at any time prior to the seizure of the Ocklahama, and could not be bound by any fact found in such personal proceedings. As a result of the institution of the proceeding to limit liability, the Ocklahama was not brought into court in any sense whatsoever, either by the surrender of the vessel to a trustee or by the giving of a bond. Even had the Ocklahama been surrendered to a trustee, the Farmers' Loan & Trust Company would not have been compelled to take notice of the proceedings, for the reason that the notice given in such proceedings is to the persons claiming losses, and the surrender to a trustee would not have divested the lien of the mortgage to the Farmers' Loan & Trust Company. Upon this subject Mr. Benedict in his work on Admiralty, 3d Edition, Sec. 573, says:

"But when the owner transfers to a trustee, the case is different. Such a conveyance could hardly be held to have the effect of a sale under the decree of an admiralty court, as to freeing her from prior liens. And it is to be noticed that the provision in the Supreme Court Rules for giving notice is for citing 'all persons claiming damages for any such embezzlement, loss, destruction, damage or injury,' which would not include prior mortgagees or prior lien holders, whose existence even might be unknown. But, as I have already said, if any such prior lien were known, and its enforcement or existence might interfere with the obtaining for the creditors in the limitation of liability proceeding, of the whole value of the res, it would be in the power of the court to remedy this difficulty."

As to the manner of remedying the difficulty suggested, the attention of the court is called to the preceding section, wherein it is stated that in case the lien of the mortgage was not satisfied, the court could refuse the limitation of liability. The text of Mr. Benedict is supported by reason and common sense. The lien of a mortgage upon a vessel could not be divested or impaired to any extent whatsoever by any transfer made to a trustee by the mortgagor for the purpose of limiting the personal liability of the mortgagor. Such a transfer could not affect the mortgage to any greater extent than would a mere deed of gift made by the mortgagor based upon the consideration of love and affection. The mortgagee is not bound to take any notice of such transfers, and is not bound to take notice of any personal litigation arising between the mortgagor and any person whomsoever, and is not bound to any extent whatsoever as the result of any such suit. The only things which the mortgagor is bound to notice are seizures made by the marshals of the District Courts of the United States in proceedings in rem to enforce maritime liens; and when such seizure is made, and not until then, is the mortgagee bound to pay any attention to the supposed existence of any maritime lien.

In order to obtain a limitation of liability, it may have been the duty of the Oregon Railway & Navigation Company to surrender the Ocklahama to a trustee or to give a bond for her appraised value. If a bond for such appraised value had been given, it would have been the personal bond of the Oregon Railway & Navigation Company, and would not have discharged or affected the lien of the mortgage made to the Farmers' Loan & Trust Company. If the Oregon Railway & Navigation

Company had sought to surrender the Ocklahama to a trustee for the purpose of limiting its personal liability, the Oregon Railway & Navigation Company would have been required, before obtaining such limitation, to have obtained a release of the mortgage of the Farmers' Loan & Trust Company upon the Ocklahama, and, failing to obtain such release, would not have been entitled to the limitation of liability.

Benedict's Admiralty, 3d Edition, Sec. 574.

Neither the giving of the bond nor the surrender to the trustee, ***both voluntary acts of the Oregon Railway & Navigation Company itself for the purpose of limiting its own personal liability***, could defeat the lien of the mortgage of the Farmers' Loan & Trust Company. Any such result would enable the owner of a vessel to discharge a mortgage without payment, as the result of instituting a suit purely for the personal benefit of such owner.

Assume that after the loss of the wheat of Balfour, Guthrie & Co., by reason of the destruction of the barge Columbia, duly authorized officers of the Oregon Railway & Navigation Company and representatives of Balfour, Guthrie & Co. had met and entered into the most solemn stipulation possible to the effect that the Ocklahama was subject to a maritime lien in favor of Balfour, Guthrie & Co., and exceeding the value of the vessel, and that then the officers of the Oregon Railway & Navigation Company had executed a deed to Balfour, Guthrie & Co. for the Ocklahama in satisfaction of such lien. Would not such conveyance be inferior to the mortgage of the Farmers' Loan & Trust Company? Suppose that such officers and representatives of the parties had failed to agree and had submitted the matter to arbi-

tration, and it had been found as a result of such arbitration that the Ocklahama was subject to a lien, and that then the Oregon Railway & Navigation Company had made a conveyance to Balfour, Guthrie & Co. Would not such conveyance be subject to the mortgage made to the Farmers' Loan & Trust Company? Assume that instead of submitting the matter to arbitration the matter was presented to a court of competent jurisdiction, either in law or in equity. In a proceeding between Balfour, Guthrie & Co. and the Oregon Railway & Navigation Company, could such court render any decree finding facts showing the existence of a maritime lien which would divest the title of the Farmers' Loan & Trust Company, or which would render any conveyance of the Ocklahama by the Oregon Railway & Navigation Company to Balfour, Guthrie & Co. superior to the lien of the mortgage of the Farmers' Loan & Trust Company? Assume that in the present case the Oregon Railway & Navigation Company, instead of contesting the liability of the Ocklahama, had in the petition instituting this proceeding conceded such liability and expressly alleged that the Ocklahama was subject to a maritime lien in favor of Balfour, Guthrie & Co., and that upon such allegations the District Court had found in favor of the existence of such lien, and had held that the Oregon Railway & Navigation Company could not limit its liability without surrendering the Ocklahama. Would such action on the part of the Oregon Railway & Navigation Company in a personal proceeding voluntarily instituted by itself and for its own benefit, in order to limit its personal liability, divest and discharge the lien of the mortgage of the Farmers' Loan & Trust Company, or would it not have been necessary for Balfour,

Guthrie & Co., in order to divest the lien of the mortgage, to have instituted a suit *in rem* and to have thus given the Farmers' Loan & Trust Company an opportunity to contend that as a matter of fact no maritime lien existed against the Ocklahama?

In other words, could the Oregon Railway & Navigation Company, by any action on its part, although aided by the decree of a court having jurisdiction only of parties and not jurisdiction *in rem* over the Ocklahama, have divested the lien of the mortgage of the Farmers' Loan & Trust Company in favor of any maritime lien of Balfour, Guthrie & Co. against the Ocklahama? It would seem that there could be but one answer to these questions, namely, that no matter how well satisfied the Oregon Railway & Navigation Company might be as to the existence of a maritime lien against the Ocklahama in favor of Balfour, Guthrie & Co., and no matter how many times a court having jurisdiction only of the parties should find in favor of such maritime lien, the lien of the mortgage made to the Farmers' Loan & Trust Company could only be divested as the result of a proceeding *in rem* in the District Court of the United States after seizure of the Ocklahama and opportunity on the part of the Farmers' Loan & Trust Company to be heard against the lien.

A maritime lien, as stated by Mr. Justice Story in The Nestor, 2 Summer, 83, is "a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors." "The concurrence of creditors" can only take place as the result of seizure in a proceeding to enforce the lien, and the consequent notice to all the world of the proceeding. It therefore follows that there can be no jurisdiction *in rem* without seizure.

The Alliance, 70 Fed. Rep. 273.

The Brig Anne, 9 Cranch, 290.

There can be no concurrence of creditors without a hearing in which each creditor is allowed to assert his own lien on the fund, and attempt to defeat the lien of others. As a result, no valid judgment *in rem* can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

In the present case all of the proceedings were purely personal proceedings between the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, on the one side, and the appellees on the other, and could result in nothing other than adjudications which would simply bind the parties thereto. To these proceedings the Farmers' Loan & Trust Company was not a party and was not bound thereby. No privity within the meaning of the law relating to estoppel existed between the Farmers' Loan & Trust Company and the Oregon Railway & Navigation Company.

Privity is the mutual and successive relationship to the same rights of property. In order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties. In the second place, privies, in such sense as they are bound by the judgment, are those who acquire the interest in the subject-matter ***after*** the rendition of the judgment. If their title or interest attached before that fact, they are not bound unless made parties.

Black on Judgments, Sec. 549.

In this proceeding the Ocklahama was not the subject-

matter of the controversy, and could not be affected in any way by any decision rendered herein. The Oregon Railroad & Navigation Company acquired its interest through the foreclosure of the mortgage made to the Farmers' Loan & Trust Company, and therefore stood in the place of the Farmers' Loan & Trust Company.

Jones on Mortgages, Sec. 1654.

The Farmers' Loan & Trust Company acquired its interest in the vessel by a mortgage in 1885, long prior to the commencement of this proceeding or the rendition of any decision herein. Both of the requisites necessary to create privity, as stated by Mr. Black, were therefore lacking.

II.

No valid decree *in rem* was or could be rendered in the present proceeding.

No valid decree *in rem* was or could be rendered in the proceeding for the following reasons:

(a) The suit was one to limit personal liability. No amendment thereto was ever made, and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.

(b) No libel was ever filed against the Ocklahama, and after her attempted seizure this appellant was not allowed to defend.

(c) The suit was for damages by a collision and was commenced *in personam* and no amendment could be made changing it into an action *in rem*.

The suit was one to limit personal liability. No amendment was ever made and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.

Congress has seen fit, by section 4283 of the Revised Statutes to limit in cases of torts committed without the knowledge or privity of the owner the total personal liability of the owner to the value of the vessel itself, and by the act of 1884 (23 Statutes at Large, p. 57) congress has limited the liability of each owner to the value of his individual interest in the vessel. In order to avail himself of the act to limit liability, the owner of a vessel may surrender her to a trustee, or such owner, as the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company did in the present proceeding, give a bond for the appraised value of the vessel. Is such a proceeding a personal proceeding between the owners and the claimants who may appear, or is it an action *in rem* against the vessel itself?

This question is plainly answered by the authorities to the effect that a proceeding to limit liability is not an action against the vessel in any sense whatsoever. When a vessel is surrendered to a proceeding, such surrender is purely a voluntary act on the part of the owner, and such an act does not and could not divest any prior liens.

Benedict's Admiralty, 3d Edition, Sec. 573.

The vessel does not pass into the hands of the trustee as a result of a seizure upon process issued out of any court of competent jurisdiction and therefore no notice is given to any lienor of such surrender. The giving of a bond for the appraised value of the vessel is purely a voluntary act of the owner and could give notice to no one interested in the vessel, and therefore no lien could arise against the vessel itself as the result of any proceedings subsequently had.

In an action against the vessel, the person commencing the action seizes the vessel subject to all prior maritime liens; but in a proceeding to limit liability, the owner must surrender the vessel free from liens or must give bond for the value of the vessel at the end of the voyage without deducting the amount of liens arising out of either prior or subsequent voyages.

Gokey v. Fort, 44 Fed. Rep. 364.

The U. S. Grant, 45 Fed. Rep. 642.

In re Morrison, 147 U. S. 34, this court has thus stated the nature of the proceeding:

"The proceeding to limit liability is not an action against the vessel and her freight except when they are surrendered to a trustee, but is an equitable action."

On the first appeal in this cause, the Circuit Court of Appeals (Record, p. 400) said:

"The barge Columbia, in respect of which the petitioners sought to limit their liability, not having been surrendered to a trustee, as provided for by section 4285 of the Revised Statutes, the proceeding taken was not a proceeding in rem, but a suit in equity. (In re Morrison, 147 U. S. 14-34, 13 Sup. Ct. 246.)"

If the proceeding was not a suit *in rem* against the Columbia whose value had been paid into court, it certainly was not a suit *in rem* against the Ocklahama, whose value had not been paid into court, and in respect to which the petitioners were not seeking any limitation of liability.

The district court had an undoubted right to enter a judgment *in rem* in a proper case, but it is a fundamental principle that no judgment can be rendered in any court not authorized by the rules and practice applicable to the particular case presented.

In order to render a valid judgment there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause.

U. S. v. Walker, 109 U. S. 267.
Ex parte Reed, 100 U. S. 23.
Hovey v. Elliott, 167 U. S. 414.
Windsor v. McVeigh, 93 U. S. 282.

In Windsor v. McVeigh, the court (p. 282) say:

"All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Norton v. Meador, Circuit Court of California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will."

Under the above cases no judgment in rem could be entered in this personal proceeding.

No libel was ever filed against the Oklahama; and after her seizure, the Oregon Railroad & Navigation Company was not allowed to defend.

In order that a valid judgment *in rem* may be entered, the following steps must be taken, in the order named:

First—There must be a libel or information filed against the thing, stating the reasons why there should be a condemnation and forfeiture.

Second—The thing must be seized within the jurisdiction of the court.

Third—Notice must be given of the seizure according to the rules and practice of the court.

Fourth—There must be a full and complete hearing of all persons appearing and claiming interests in the thing.

Rules of Practice in Admiralty, Rule One.

The Alliance, 70 Fed. Rep. 273.

The Brig Anne, 9 Cranch, 290, 1.

Taylor v. Carroll, 20 How. 599.

The Rio Grande, 23 Wallace, 464.

Windsor v. McVeigh, 93 U. S. 274, 277.

Hovey v. Elliott, 164 U. S. 414.

The first admiralty rule provides as follows:

"No mesne process shall issue from the district courts in any civil cause of admiralty or maritime jurisdiction until the libel or libel of information shall be filed in the clerk's office from which such process is to issue."

In the present proceeding, no libel against the Ocklahama was filed. The answer of Balfour, Guthrie & Co. (Record, p. 20) prays that the respondents "be decreed to recover from the said libelants and petitioners the full amount of their damages in this behalf sustained." The answer of Malvina Short (Record, p. 32) prays "for a judgment against said libelants for the sum of $5,000 damages," and a similar prayer is found in the answer of Sven Anderson (Record, p. 37). Personal liability was the thing sought to be avoided on the part of the Ore-

gon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company when the petition was filed and this proceeding initiated; and personal liability on the part of the petitioners was the thing sought to be established at the time the answers of the various claimants were filed; and no libel or information seeking a judgment in rem was ever filed against the Ocklahama by any of the claimants.

In Ward et al. v. Cunningham et al., 21 How. 572, the parties had sought by stipulation to make the answer treated as a cross-libel in the cause. In condemning such procedure this court said:

" Regularity in pleading is both convenient and essen-
" tial in judicial investigations, and such departures from
" the usual practice as are exhibited in this record ought
" not to receive countenance."

Seizure of the res is the foundation of jurisdiction in rem. This principle is stated and applied by the Circuit Court of Appeals for the Ninth Circuit in The Alliance, 70 Fed. Rep. 273.

The same familiar principle is stated by this court in the Rio Grande, 23 Wallace, 458, 464, citing and referring to the Brig Anne, 9 Cranch, 290, and Taylor v. Carroll, 20 Howard, 599.

In the present case the Ocklahama was seized, but after seizure the Oregon Railroad & Navigation Company was not allowed to defend.

The jurisdiction acquired by seizure is the right to hear and determine; not to determine without hearing.

In Windsor v. McVeigh, 93 U. S. 278, this court said:

"The jurisdiction acquired by the court by seizure of the res was not to condemn the property without further proceedings. The physical seizure did not of itself estab-

lish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit in rem only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges."

In the same case, on page 277, it is further said:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his right, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham

and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

After making the foregoing quotation from Windsor v. McVeigh, Mr. Justice White, in Hovey v. Elliott, 167 U. S., p. 415, says: "This language but expresses the most elementary conception of the judicial function."

The district court sustained the exceptions to the answer of the Oregon Railroad & Navigation Company on the ground that the proceedings had, prior to the mandate of the Circuit Court of Appeals, constituted an adjudication against the Ocklahama and all persons interested therein, and gave to that adjudication the effect of a judgment in rem to enforce a maritime lien.

To condemn the Ocklahama in this proceeding is to condemn without a libel, and thus violate the first admiralty rule of this court. To condemn the Ocklahama as the result of the proceedings had before seizure is to hear without jurisdiction. To condemn the Ocklahama as the result of the proceedings had after her seizure is to determine without a hearing.

Under the decisions of this court already cited, the decree in the present case could not stand, even if collaterally attacked.

No amendment could change this suit into one *in rem* against the Ocklahama.

The accident to the Columbia commenced by the striking of the pontoon lying in front of the dock, and the injuries suffered by the various claimants were received through the collapse of the barge, resulting from the collision between the barge and the bottom of the Columbia river. Any suit instituted in admiralty, either *in rem* or *in personam* to recover damages received through the accident, would be a suit "for damage by collision" within the meaning of the fifteenth admiralty rule.

In Corsair, 145 U. S. 335, Eliza Barton, as stated on page 336, was killed as the result of a collision between the tug Corsair, on which the said Eliza Barton was riding, and the right bank of the Mississippi river, and the proceedings instituted to recover damages for her death were treated as coming within the fifteenth admiralty rule. This rule, by its terms, and as interpreted by this court in the Corsair, prohibits the joinder in a suit for damage by collision of an action *in rem* and an action *in personam*. In the Corsair, according to the statement of facts, page 337, a libel in rem was filed against the Corsair, the vessel was arrested, and was released on a stipulation given by her owners, Samuel S. Brown and Harry Brown. Exceptions were filed to the libel on the ground that it set forth no cause of action cognizable by proceedings *in rem*. The exceptions were sustained; and the libelants were allowed to amend their pleadings and proceed *in personam;* and on the following day an amended libel was filed against the owners of the Corsair. Exceptions were filed to the amended libel on the ground that there was no power in the court to allow the libelants to change the suit from a suit *in rem* to a suit *in personam*. This court held that the exceptions were properly sustained, and the effect of rule 15 is stated, commencing on page 341 of the opinion.

The present proceeding at the outset was purely a personal proceeding between the parties interested therein, and it could not, under the decision of the Corsair, be changed by any amendment into a proceeding *in rem* against the Ocklahama. It follows, therefore, that even if all of the steps necessary to a judgment in rem, including seizure and hearing after seizure, had been taken, no decree *in rem* against the Ocklahama could be rendered in the present proceeding; but an independent proceeding must necessarily be commenced.

The Oregon Railroad & Navigation Company is not estopped by any proceeding had prior to the seizure and was not allowed to defend after seizure.

A judgment in rem, provided there has been seizure and notice of seizure, is binding upon all the world; but if there has simply been seizure, without notice thereof, the judgment binds only the parties who appear therein.

Bailey v. Sundburg, 49 Fed. Rep. 583, 585.

In the case just referred to, the owner of the vessel which sunk by collision with a steamer brought a libel in rem and the steamer was attached, but no notice was given or publication made, as required by admiralty rule 9. Subsequently the steamer was released on her owners giving bond to the libelant. It was held that a decree dismissing the libel was binding on the libelant only, and would not prevent a new libel by the owner of the cargo. This decision arises from the principle that, in addition to seizure, notice of the proceedings, by monition or publication in some form, must be given before any binding judgment in rem can be given. This principle is clearly stated by Mr. Justice Field in Windsor v. McVeigh, 93 U. S. 274, 279, as follows:

"The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."

In some instances, where suits in rem have been successfully prosecuted against a claimant who has appeared, the successful party has been allowed to recover in personam; but in all such cases the distinction between actions in rem and actions in personam has been carefully preserved and the libelant has been required to introduce proper allegations in personam and proceed upon them to a further decree against the person.

Benedict's Admiralty, Third Edition, Sec. 547.

The Zodiac, 5 Fed. Rep. 222.

Such action, however, cannot be taken in a suit for damage by collision, for the reason that an action *in rem* and an action *in personam* to recover damages for collision cannot, under the fifteenth admiralty rule, be joined in the same proceeding.

The Corsair, 145 U. S. 335.

Unless there be introduced in the proceeding *in rem* appropriate allegations as to the ownership of the vessels and the commission of the tort or the violation of the contract by some particular individual, the decision in the proceeding *in rem* cannot operate as an estoppel in a subsequent proceeding *in personam*.

The Jesse Williamson, Jr., 108 U. S. 305, 311.

In a proceeding *in rem* without seizure and notice of seizure, no judgment *in rem* can be rendered having any binding force whatever.

The Alliance, 70 Fed. Rep. 273.

Taylor v. Carroll, 20 Howard, 599.

Windsor v. McVeigh, 93 U. S. 274.

No judgment *in rem* having any binding force whatever can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

Hovey v. Elliott, 167 U. S. 414.

The foregoing authorities clearly dispose of the claim that the proceedings had in this cause prior to seizure amounted to an adjudication *in rem* against the Ocklahama or against this appellant. There was no libel filed against the Ocklahama; there was no seizure; there was no notice of seizure, and there was no hearing. Every essential, therefore, necessary to a valid judgment *in rem* was lacking.

If the proceedings prior to seizure be regarded, as indeed they must, as a proceeding *in personam* between the persons parties thereto, the decision rendered can operate as an estoppel only between the persons parties to the proceedings, their privies and successors in interest. Neither the Oregon Railroad & Navigation Company nor the Farmers' Loan & Trust Company were parties to the original proceedings. No privity existed between the Oregon Railroad & Navigation Company and the Oregon Railway & Navigation Company. Privity is the mutual and successive relationship to the same rights of property. In order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be

one who claims an interest in the subject affected through or under one of the parties. In the second place, privies, in such sense as they are bound by the judgment, are those who acquire the interest in the subject-matter *after* the rendition of the judgment. If their title or interest attached before that fact, they are not bound unless made parties.

Black on Judgments, Sec. 549.

In this proceeding the Ocklahama was not the subject-matter of the controversy, and could not be affected in any way by any decision rendered herein. The Oregon Railroad & Navigation Company acquired its interest through the foreclosure of the mortgage made to the Farmers' Loan & Trust Company, and therefore stood in the place of the Farmers' Loan & Trust Company.

Jones on Mortgages, Sec. 1654.

The Farmers' Loan & Trust Company acquired its interest in the vessel by a mortgage in 1885, long prior to the commencement of this proceeding or the rendition of any decision herein. Both of the requisites necessary to create privity, as stated by Mr. Black, were therefore lacking.

III.

The facts as to the cause of accident alleged in the answer of The Oregon Railroad & Navigation Company constituted a good defence.

If the Ocklahama and her owner, the Oregon Railroad & Navigation Company, were not bound by the proceedings had prior to the seizure, then that company was entitled to defend, and to have any defence interposed by

it disposed of in the ordinary way as the result of a hearing. The opinion of the Circuit Court of Appeals on the second appeal (Record, p. 575) shows that the merits of the defense undertaken to be made were never considered by that court, and that the decision rested solely on the ground that the Ocklahama and the appellant were bound by the prior proceedings. It may be that the defense was not good, but nevertheless the appellant had a right to have such defense passed upon by the court.

The defense made was true in fact and good in law. The answers of the appellant (Record, pp. 475, 481, 488, 495) alleged that the Oregon Short Line & Utah Northern Railway Company was in the possession of all of the property of the Oregon Railroad & Navigation Company, including the Ocklahama and the barge Columbia, and had sole and exclusive possession and management of said boats during the month of October, 1892; that, on the 19th day of October, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat, to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that said barge was under the charge of a captain, who had no connection with any other boat or vessel than the Columbia, and that the captain of said barge, for and on behalf of the said Columbia, executed and delivered to said Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded; that the said barge Columbia was, on the 19th day of October, 1892, taken in tow by some boat or vessel other than the Ocklahama and was towed from the dock at which she had been loaded to a point or place in the City of Portland known as the boneyard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October,

1892; that on the afternoon of the 21st day of October, 1892, the steamboat Ocklahama took said barge Columbia in tow for the purpose of towing the said barge Columbia from the boneyard in Portland to the dock of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company, at Astoria, Oregon, at which said dock the said Ocklahama was to leave the said barge, and was not expected or intended to further tow said barge; that no contract was made with the said Ocklahama by the said Balfour, Guthrie & Co. for the towage of said barge; that on the arrival of the said Ocklahama with the said barge at the dock at Astoria, the said Ocklahama was under orders to return immediately to Portland, leaving the said barge along the said dock. The answers then allege the facts concerning the voyage to Astoria and the striking of the pontoon, and the taking of the barge behind the dock, and the placing of the same in a safe position alongside of the dock, as found by the decree of the district court (Record, p. 84). The answers then allege that, after the said barge had rested against the dock for an hour and a half, the master of the barge negligently caused the cargo on the deck of the barge to be shifted until the barge was on an even keel and was no longer resting against this dock; that by reason of such negligence the barge was caused to list, and the loss of the wheat and the injury to Short and Peterson thereupon followed; that while the barge remained against the dock the cargo of said barge might easily have been removed from the dock; that the steamer Ocklahama did not in any way cause the said injury; that the same was caused solely by reason of the negligence of the captain of the barge, as aforesaid; that the

injury to said wheat was caused solely by a peril over which the said Ocklahama and her officers and crew had no control, and that said injury could not have been prevented by the exercise of any care on the part of the said Ocklahama or her officers and crew; that it was not intended that the said Ocklahama should tow the said barge Columbia any further than to the said dock at Astoria, Oregon, and that said barge was to be delivered to the ship Westgate by some other tug, and that no contract was ever made with the said steamer Ocklahama or her owners for the towage of the said barge Columbia to the said Westgate, and that the only contract existing for the towage of the said barge was that resulting by operation of law from the facts hereinbefore stated; that no libel had ever been filed in the cause against the said Ocklahama or her owners or charterers.

The Circuit Court of Appeals, in its first opinion, assumed that a contract had been made by the Ocklahama to tow the Columbia to the Westgate, and that the voyage of the Ocklahama was not ended when the accident happened. The answer negatives any such assumption of fact, and shows that the contract of carriage was made by the Columbia; that the towage services of the Ocklahama were ended before the loss of the wheat; that the wheat was placed by the Ocklahama in a safe position; and that the injury occurred by reason of the negligence of Ferguson alone.

The Columbia and the Ocklahama are separate and distinct things. Each had its owner, its general creditors and its lienors.

Each is subject to separate and distinct liens arising as a result of maritime contracts made on behalf of the

vessel or of maritime torts committed by it. Maritime liens cannot be extended by construction, analogy or inference. This principle and the nature of a maritime lien is clearly stated in the case of *Vandewater v. Mills*, 19 How. 89, as follows:

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy or inference. 'Analogy,' says Pardessus (Droit Civ., Vol. 3, p. 597), 'cannot afford a decisive argument, because privileges are of strict right.' They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

The law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made and the cargo is shipped under it.

The Freeman v. Buckingham, 18 Howard, 388.
Vandewater v. Mills, 19 How. 89.
The Keokuk, 9 Wallace, 517.

In the present case the contract of affreightment was made by the master of the barge Columbia, and the shipping receipt was issued by said master on behalf of the barge. Such a contract of affreightment could create no lien against the Ocklahama. The Ocklahama, if negligent in towing the barge, might, as a result of such tort, become subject to a lien in favor of the barge or its cargo, but cannot be made subject to a lien in favor of the cargo of the Columbia as a result of the contract of affreightment made on behalf of the Columbia. It cannot be said that because a tugboat assists in towing a vessel, such tugboat becomes, as a result of such act, subject to a lien for the performance of all of the contracts of affreightment entered into by the vessel in respect to the freight shipped thereon.

It is undoubtedly true that it is not absolutely necessary that the merchandise received under a contract of affreightment shall actually be physically placed in the vessel.

Buckley v. Naumkaeg Company, 24 Howard, 386.

It is stated by this court in that opinion (p. 389) that the "condition of the Bay of Mobile, which is somewhat peculiar, because material to the proper understanding of the question in this case." It is then stated that vessels of large size and drawing over a given depth of water cannot pass the bar in the bay, which is situated at a considerable distance below the city, and that the cargo of such vessels is brought to them in lighters from the city over the bar, and then laden on board the vessel. It is stated (p. 389) that from the agreed statement of facts it

appears that the master of the vessel then lying at the Port of Mobile agreed to carry for the libelant 770 bales of cotton from that port to Boston. The custom of the port was shown in evidence, and it was held that the delivery to a lighterman as the agent of the ship was a delivery to the master of the ship, so as to render the ship liable for the performance of the contract of affreightment. It will be noted that a contract of affreightment was actually entered into on the part of the ship, and the only question involved in the case was as to what constituted a delivery. The opinion nowhere states, however, that a delivery to the lighter without a contract on the part of the ship would render the ship liable for the acts of the lighter.

Any such result is contrary to the principles stated in The Keokuk, 9 Wallace, 517. In that case it is clearly held that the law creates no maritime lien on a vessel as security for the performance of a contract to transport a cargo unless some contract of affreightment on behalf of the vessel has been made, and that, under the fact, no contract was shown, and hence the Keokuk was not liable for the loss of the grain on the barge.

The Keokuk, supra, and the Northern Belle, 9 Wallace, 522, show the manner of handling grain in bulk upon the Western rivers. Barges are left at various places along the river, to be loaded by the shippers with grain in bulk delivered from elevators. (9 Wall. 528.) During the time of loading, the barge is under the control of the shipper, and is simply a receptacle into which the grain may be placed. From time to time steamboats arrive, make contracts for the carriage of the grain, and convey the grain to its destination. When contracts of affreightment are made by the steamer, then, on the prin-

ciple established in the case of *Buckley v. Naumkaeg*, 24 Howard, 386, the steamer becomes responsible for the safe delivery of the grain, and becomes subject to a lien for any breach of the contract of affreightment.

This court has directly held, in the case of the J. P. Donaldson, 167 U. S. 599, 603, that a tug towing a barge is not liable as an insurer for the cargoes on board the barge, and that the owners of the barge or the cargoes could not maintain any action for the loss of either against the tug or her owners, without proving negligence on the part of the tug.

In the present case the contract of affreightment was made with the barge Columbia, and no contract of any kind whatsoever for the carriage of the goods was made for or on behalf of the Ocklahama. It is true that both boats were owned by the Oregon Railway & Navigation Company; but it is equally true that the Farmers' Loan & Trust Company had an interest in the Ocklahama, which can only be divested as the result of a maritime lien against that vessel.

Under the decision of this court in the J. P. Donaldson, supra, the Ocklahama could only be held liable as a result of a tort committed by the Ocklahama. The answer alleges and the courts below found that no such tort had been committed by the Ocklahama, and hence it follows that there is no lien against that vessel.

In the case of Sturges v. Boyer, 24 How. 110, a tug towing a ship was alone held liable for a collision to a third vessel. That result was reached for the reason that the fault causing the collision was committed by the tug alone and the reasoning of the court on page 122 clearly shows that in cases where the tow alone was at fault, the tug would not be subject to any lien.

The decision in The Bordentown, 40 Federal Reporter, 687, is clearly against the position taken by the Circuit Court of Appeals, and holds that, no matter how many boats owned by the same person may be engaged in the performance of the same service or contract, the owner may limit his liability by a surrender of the boat or boats at fault, and need not surrender the others. The Pennsylvania Railroad Company, the owner of three tugs, The Bordentown, The Winnie and The Willie, engaged to take a fleet of canal-boats or barges from South Amboy to the sea fence in Brooklyn. The tow left South Amboy in charge of The Winnie and The Willie. Soon after leaving South Amboy the tow was joined by The Bordentown, which boat took charge of the fleet. The Willie detached a portion of the tow and landed it safely at the Standard Oil Company's dock near Port Johnson, and The Bordentown and The Winnie proceeded with the tow. After passing the mouth of the Kills and entering the bay, the water was found to be very rough, and it was deemed unsafe to proceed to the sea fence at Brooklyn on account of the direction of the wind making that place unsafe to moor the tow. The tow then proceeded in the direction of the American docks, but after going in this direction for a time the wind shifted, so as to render these docks an unsafe mooring-place. The fleet was then headed in the direction of the Kills, but had not gone far in this direction when it was joined by The Willie, whose captain had come from Port Johnson after having landed his detachment of the tow at that point, to render any assistance to The Bordentown that might be needed (p. 685). The captain of The Willie reported that the water was very rough at the mouth of the Kills, and the pilot of The Bordentown determined

again to cross the bay to Brooklyn. After having proceeded in this direction for a distance, the Hughes, the port hawser boat, sunk on account of filling with water, and parted the port hawser. The tow then got loose from the tugs and pounded each other in the open sea, and many of the boats were lost. The Winnie rescued one boat, and The Willie two others. The railroad company offered to surrender the three boats. It was held that the fault was committed in undertaking to cross the bay, and that as The Willie was not present at the time the first attempt was made, she need not be surrendered.

It will be noted, however, that The Willie started with the tow, and afterwards returned to it to render any service needed, and was at all times performing some service in connection with the tow. On the theory of the Circuit Court of Appeals, she was pledged to the performance of the work, and must therefore be surrendered. She was held, however, not to be a party to the fault, and therefore need not be surrendered.

The result in The Bordentown shows that where several tugs belonging to the same person engage in the same service, only those tugs actually at fault are liable. Such a result is supported by the decision of this court in the cases cited in The J. P. Donaldson, 167 U. S. 599. On the theory contended for by respondents, every towboat handling a ship, and every barge lightering a part of a ship's cargo, would be responsible for all the contracts of the ship, not only while performing service for the ship, but also after such service was ended. Such is not the law. Even while engaged in service, a tug is not liable for the contracts of the tow, but only for negligence.

The J. P. Donaldson, 167 U. S. 599.

The contract of carriage in the present case was made with the Columbia alone. The answer shows that the Ocklahama was not negligent; that the services of the Ocklahama were ended when the accident occurred. Under these circumstances, no maritime lien exists against the Ocklahama in favor of the respondents, Balfour, Guthrie & Co.

Marshall Short was captain, and John August Peterson was a deckhand, on the Ocklahama. They were killed through the negligence of Ferguson, the captain of the barge Columbia. By what process of reasoning can it be held that the Ocklahama was subject to a maritime lien in favor of the representatives of Short and Peterson?

For the reasons stated, the decree rendered by the court below should be reversed.

W. W. COTTON,
For Appellants.

A. B. BROWNE, of Counsel.